

No. 42787-7-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

JAMES A. OLIVER

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 09-1-05834-4

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

The appellant adopts the statement of facts and procedural history as set forth in his opening brief as if fully set forth herein.

II. ARGUMENT

A. DE NOVO IS THE PROPER STANDARD OF REVIEW FOR THE TRIAL COURT'S DENIAL OF A COMPLETE DEFENSE

Under State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), DeNovo is the proper standard of review when a defendant was denied a complete defense. Id. As articulated in Petitioner's opening brief, because a defendant enjoys the right to a complete defense under the 14th and 6th Amendments to the Constitution of the United States, a five part balancing test applies. See, Brief of Appellant at 15. It is under the five part balancing test from Miller v. Stagner, 757 F.2d 988, 994 (9th Cir.), amended on other grounds, 768 F.2d 1090 (9th Cir. 1985) that this court must review whether Mr. Oliver was afforded a complete defense.

Respondent proposes that because the Glenn Whitworth issue was addressed by a motion in limine and the trial court ruled it was not relevant, on review the court should defer to the trial court. This ignores the 9th Circuit's decision in United States v. Stever, 603 F.3d 747 (9th Cir. 2010). As noted in Petitioner's opening brief, the court inherently has to review the trial court's "evidentiary" ruling. Id. at 753, CP 118-119. Within this body of law, the only reasonable conclusion is that de novo review must occur, as it is impossible to scrutinize the trial court's action without de novo review.

Respondent's argument for the abuse of discretion standard ignores the constitutional nature of the trial court's alleged error. The abuse of discretion standard offered by the state is inappropriate upon allegations of alleged constitutional magnitude. See, State v. Jones, 168 Wn.2d at 720.

Accordingly, this court must examine the argument before the trial court and rule on its admissibility.

Petitioner relies on its opening brief that the proffered evidence of Glenn Whitworth's sex offender status was relevant, that defense counsel showed in briefing and during oral argument that it was relevant to Mr. Oliver's defense, and that it was admissible. Depriving Mr. Oliver of this crucial and relevant evidence denied him a complete defense under the 14th and 6th Amendments. Petitioner has now repeated those efforts with this court and upon de novo review, this court should rule the Glenn Whitworth evidence admissible and essential to Mr. Oliver's complete defense and remand to the trial court for a new trial instructing the court to admit the proffered evidence.

B. THE TRIAL COURT LIMITED MR. OLIVER TO A PARTIAL DEFENSE WHEN IT ALLOWED THE DEFENSE TO INTRODUCE EVIDENCE OF TM'S ABUSE WITHOUT ALLOWING THE JURY TO HEAR THE WHOLE STORY.

Respondent argues the trial court allowed Mr. Oliver a complete defense. In fact, allowing evidence of TM's abuse and DO's desire to live with her mother without the Glenn Whitworth was tantamount to selling a book that lacks its final chapter. Mr. Oliver's defense was accordingly incomplete.

As indicated, the defense proved that despite years of Mr. Oliver having custody of DO she expressed her desire to live with her mother, Jeannie. RP 264. Jeannie, however, having left her family for a registered sex offender, continued to live with that very sex offender, Glenn Whitworth, whom she ultimately married. See Pretrial argument at RP 93-95. This arrangement continued for years. And DO's desire to live with her mother continued. RP 517. DO's older brother, TM, carried himself with an angry and at times violent disposition. RP 474-481. Sometimes this was at DO's expense. Id. This left DO a reasonable ambition to leave the Oliver home. But obviously her expressed desire amidst TM's abuse was insufficient to overcome Mr. Whitworth's sex offender status as her custody continued with her father in the Oliver home. DO was clearly aware that in order to change her custodial arrangement something more dangerous than a registered sex offender needed to be reported. This ultimately came in the form of her complaints alleged in this case.

The defense was deprived of the opportunity to present evidence why DO was not allowed to live with her mother. While the defense was allowed to introduce DO's desire to leave, and reasons why DO wanted out of the Oliver home (i.e. TM.), the story was incomplete without the relevant background. The defense was incomplete because Mr. Oliver did not get to explore the issue. DO would have articulated her familiarity with Mr. Whitworth's sex offender status. CP 170. Jeannie would have confirmed that and would have confirmed it as the reason she did not enjoy custody of DO. See CP 170, excerpt from Jeannie Whitworth interview. In short, in light of the above factors that the court allowed,

Mr. Oliver was deprived a complete defense when he was deprived showing the jury the size of the barrier that DO had to overcome in order to escape TM's abuse and enter the very place she sought sanctuary.

C. DO'S TAPED INTERVIEW WAS CUMULATIVE EVIDENCE
AND SHOULD HAVE BEEN EXCLUDED

1. The objection was preserved.

During pre-trial arguments the defense presented argument articulating evidentiary shortcomings related to the proffered child hearsay statement. RP 62-66. This concluded with defense counsel stating his objection as follows, "... I would ask the court to not allow the hearsay statements." RP 65. The trial court proceeded to make a "final ruling" on the admissibility of DO's statement. Specifically, the court stated, "Given the persons to whom she disclosed, given the consistency in the statements that were made, I certainly think that the catchall is there as well. Based on all of the Ryan factors, I'm going to allow the disclosures to Ms. Stevens, Dale Montgomery, and the record will be made I presume then for Ms. Hanna-Turcott once we have her present?" RP 70. To which the state answered, "Yes, Your Honor." Id. The court concluded its ruling, "Okay..." Id.

In the present scenario, the court made a "final ruling." A look at that ruling shows the court admitted hearsay testimony through several witnesses, including Ms. Stevens, Ms. Montgomery, and Ms. Hanna-Truscott. RP 70. The ruling also inferentially included the court's intent to hear both live and recorded testimony of DO. See, RP 40, *State's Memorandum Supporting Admission of*

Child Hearsay Statement, P. 9 (The state informed the trial court prior to the Child Hearsay Hearing that the state intended to call DO at the time of trial.)

In the case against Mr. Oliver, the trial court's intent to allow cumulative testimony from DO was clear from the time of the court's pretrial order. That is, not only was child hearsay going to be allowed, but the court expected multiple witnesses, including DO herself, to testify about the same subject matter. The matter of cumulative testimony was clearly considered and addressed concomitantly. As such, this court must consider Petitioner's cumulative evidence assertions from the opening brief.

While RAP 2.5(a) states that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court..." RAP 2.5(a) the stringency of this rule is mitigated by RAP 1.2(a) which states that the RAPs are to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a); see State v. Robinson, 171 Wn.2d 292, 305, 253 P.3d 84 (2011). See State v. Wicke, 91 Wn.2d 638, 642, 591 P.2d 452 (1979), quoting State v. Fagalde, 85 Wn.2d 730, 539 P.2d 86 (1975).

2. Making the best use of evidence admitted over objection does not constitute waiver of appellate argument.

To appeal issues raised prior to trial, a waiver of the right to appeal depends on whether the trial court made a final ruling. "If the trial court makes a final ruling, 'the losing party is deemed to have a standing objection ... '[u]nless the trial court indicates that further objections at trial are required.'" State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995)(*quoting State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v.*

Brown, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989)); Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 91, 549 P.2d 483 (1976).

As indicated by Respondent, the defense used specific references from the child hearsay video to cross examine the inconsistencies from DO's live testimony. Nothing about using this traditional trial technique of impeachment on prior inconsistent statements created a waiver scenario. Rather, in accord with the above body of law, the defense had preserved its objections pre-trial, no further objections were required by the trial court. See, RP 66-70. Those matters are therefore preserved despite the defense attempting to use the inconsistencies as effectively as possible.

III. CONCLUSION

For the reasons cited above and the authority cited herein and in Petitioner's opening brief, the court should grant the relief requested and reverse and remand Mr. Oliver's conviction.

RESPECTFULLY submitted this 14 day of January, 2013.



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CERTIFICATE OF SERVICE

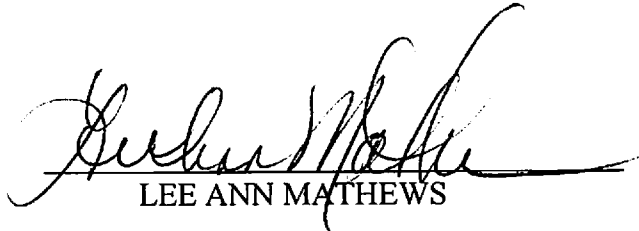
Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 14th day of January, 2013.


LEE ANN MATHEWS

HESTER LAW OFFICES

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